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International Law Situations with Solutions and Notes

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SITUATION III

BELLIGERENCY AND MARITIME JURISDICTION

States X and Y are at war. Other states neutral.

(a) The *Xerxes*, a cruiser of State X, is refueling from the *Petro*, a tanker, in quiet water more than 3 miles from the coast of State R, the only state within 100 miles, but inside and more than 3 miles from a reef off the coast of State R. The reef is generally submerged, but certain rocks are exposed at low tide. State Y protests to State R. State R takes no action upon the protest. A submarine, *Y 50*, of State Y, then sinks the *Petro*. The *Y 50* is brought to the surface by depth bombs from the *Xerxes*, but succeeds in beaching itself on a reef less than 3 miles from State R. The *Xerxes* takes off the crew of the *Y 50* and makes them prisoners of war.

Have States X, Y, and R grounds for protests?

(b) Later the *Xenophon*, a companion ship of the *Xerxes*, runs upon the reef at a point $6\frac{1}{2}$ miles from any point of State R. A salvage ship flying the flag of and belonging to a corporation of State R is endeavoring to get the *Xenophon* off. A submarine of State Y, the *Y 51* appears and demands that salvaging operations cease, that the crew of the *Xenophon* be taken on board the salvaging ship as the *Y 51* is about to destroy the *Xenophon* by torpedo fire. A cruiser of State R is standing by, and the *Xenophon's* armament and boats are intact. What action?

SOLUTION

(a) As neutral State R takes no action, the action of submarine *Y 50* is lawful. The defense of cruiser

Xerxes is lawful, but the taking of the crew of the beached *Y 50* as prisoners of war is not lawful.

State X has no ground for valid protest.

State Y may protest against the taking of the crew of *Y 50* as prisoners of war.

State R may protest against the action of the *Xerxes* in entering its waters and making the crew of *Y 50* prisoners of war.

(b) The place of salvaging is in the high sea and the salvaging operations are lawful. The salvaging vessel is under obligation to cease operations but under no obligation to take the crew of the *Xenophon* on board. The relative weakness of the submarine *Y 51* gives it no right to demand exceptional services from the salvaging vessel. The *Xenophon's* armament and boats being intact, the conditions for which the Hague-Geneva Convention provides have not arisen, and the salvaging vessel may decline to take any action except to discontinue salvaging operations unless upon agreement of all parties.

Situations I and II, 1931.—In Situations I and II above, many citations equally applicable to Situation III are given. These are not repeated in the following pages but may be found under the appropriate heading from the index.

Discussions at Naval War College.—The problem of taking on fuel for vessels of war in neutral jurisdiction has been considered in various aspects at this Naval War College. In the early part of the nineteenth century, it was usually some aspect of coaling that was discussed. In 1901 coal as contraband and the supply to belligerent ships was mentioned. In 1902 the amount that might be taken was considered. In 1903 the proposed Naval War Code was before the conference but in 1904 the taking of coal from supply ships arose. In 1905 the question was "what are the circumstances under which food stuffs and coal, and raw material, such as cotton, can be declared to be contraband?" The supplying of fuel or oil

to belligerent vessels in neutral ports was one of the topics in 1906. The status of a collier in a foreign port and the nature of collier service were topics in 1907. Coaling in neutral waters became the object of further attention in 1908 in consequence of the provisions of The Hague Conventions of 1907 and the discussions at The Hague Conference of 1907. In 1909 the Declaration of London brought many problems of neutral rights and obligations before the conference, and in 1910 one of the situations related primarily to coaling within neutral jurisdiction. Such recurrence of the topic of coaling gives evidence of the problems which centered about taking on fuel in the first decade of the nineteenth century.

Geneva Arbitration, 1871.—The Geneva Arbitration Tribunal under the treaty of Washington, May 8, 1871, relating particularly to the Alabama claims, gave much attention to coaling as coal was at that time a great source of motive power. Reference has often been made to the arguments and discussion before the tribunal in the publications of the Naval War College, but it seems desirable to repeat some of these, as the award of the tribunal and the articles of the treaty of Washington have become the basis of modern neutrality proclamations.

The rules of the treaty of Washington which relate to this matter were as stated in Article VI, that—

A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. (17 U. S. Stat. 863.)

Early American cases.—As early as 1793 the question of capture in American waters arose. The French frigate *Embuscade* captured the British ship *Grange* in the Delaware Bay. The Attorney General advised the Government that the Bay was within the jurisdiction of the United States and that the *Grange* should be released and the *Grange* was released. (Amer. State Papers, 1 Foreign Relations, p. 148.) Jefferson at this period recognized that the obligation to maintain neutrality extended to 3 miles. The neutrality act of June 5, 1794, gave for the United States clear principles of conduct which in later years have been widely followed. Article VII of the Jay treaty mentions specifically the satisfaction of claims of British merchants and others who have "sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States." Under this article the British brig *Pilgrim*, captured October 6, 1793, within 2½ miles from the United States, was adjudged to be restored.

During the War of 1812 there were several cases in which belligerents made use of territorial waters in hostilities. The American frigate *Essex* was attacked by the British frigate *Phoebe* and sloop *Cherub* in 1814 in the territorial waters off Valparaiso and the *Levant*, an American prize, was chased into Port Praya and captured while there. The American privateer *General Armstrong* was destroyed by a British squadron in the same year in the port of Fayal. Such acts led to vigorous protests on the part of the United States to the neutral states. The case of the *General Armstrong* was made the basis of a long pending claim against Portugal which was at length referred to Louis Napoleon, who in 1852 rendered an award to the effect that Portugal

was not liable as the local authorities had not been called upon to furnish protection, the American privateer having fired upon a British longboat which the captain of the *General Armstrong* maintained was planning to board the privateer. The claim came before the Court of Claims of the United States on the ground that it was not properly placed before Louis Napoleon and was disallowed. Congress subsequently granted nearly \$71,000 to the claimant as Senator Platt recognizing the patriotism of the personnel of the *General Armstrong*, said also "it appeals strongly to the imagination." In the case of the *Anna*, which the British had captured within 3 miles of the coast of the United States off the mouth of the Mississippi and brought to England, Sir William Scott (Lord Stowell) said in 1805:

The conduct of the captors has on all points been highly reprehensible. * * * In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages. (5 C. Robinson Admiralty Reports, p. 373.)

The U. S. S. *Wachusett* on October 7, 1864, captured in the harbor of Bahia, Brazil, and took to the United States the Confederate cruiser *Florida*. Brazil demanded reparation. The President disavowed the act, suspended the commander of the *Wachusett*, dismissed the consul who had advised the capture, ordered a salute of the Brazilian flag, released the crew of the *Florida* and the Secretary of State declared the capture of the *Florida* to be "an unauthorized, unlawful, and indefensible exercise of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized Government."

It is clear that hostilities within neutral maritime jurisdiction have been increasingly regarded as without the sanction of law. The obligations of a neutral to prevent even the use of its territory as a base is similarly evident

and was brought out clearly in the *Alabama* award and in neutrality proclamations since 1871.

The "Twee Gebroeders."—One of the early cases in regard to belligerent use of territorial waters, arose in consequence of a claim that on July 14, 1799, four Dutch ships had been taken while they were in neutral territorial waters. This case relating particularly to the *Twee Gebroeders* came before the British Prize Court in 1800.

It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her which could affect the right of territory, or from which any inconvenience could arise to the country within whose limits she was lying, inasmuch as the hostile force which she employed was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far. I am of opinion that no use of a neutral territory, for the purposes of war, is to be permitted. I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For, suppose that even a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not itself an act directly hostile, not complete, indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I sent out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned, to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground. The act of hostility actually begins,

in the latter case, with the launching and manning and arming the boat that is sent out on such an errand of force. (*The Twee Gebroeders*, 3 C. Robinson, p. 162.)

German ordinance, 1909.—The German ordinance of September 30, 1909, made provisions in regard to the right of capture which would in general apply to hostilities in neutral waters as follows:

Art. 3. The right of capture does not hold—

(a) Within neutral waters; i. e., within a sea area, 3 sea miles wide, measured from the low-water coast line, bordering the coast and the islands and indentations appertaining thereto. As appertaining are: Islands which are not farther than 6 miles distant from one of the mainland coasts of the same State; indentations whose coast is exclusively in the possession of the neutral State and whose opening is 6 sea miles or less wide.

(b) Within those waters which are by convention closed to operations of war or to ships of war. These are:

“(α) The Suez Canal, including its entrance harbors and a sea area of 3 sea miles beyond them. (Art. 4, sec. 1, of the treaty of Constantinople of October 29, 1888.)

“(β) The Bosphorus and the Dardanelles, so far as Turkey is not herself a belligerent: (Treaty of London concerning narrow seas of July 13, 1841; art. 10 of the Peace of Paris of March 30, 1865, and Appendix I thereto; art. 2 of the treaty of London of March 13, 1871; art. 63 of the treaty of Berlin of July 13, 1878.)

“(γ) The waters of Corfu and Paxos, so far as no other power than Greece, Great Britain, France, Russia, Austria-Hungary, and Germany are parties to the war. (Art. 2. of the treaty of London of November 14, 1863, and art. 2 of the treaty of London of March 24, 1864.)

“(δ) The mouths of the Danube. (Art. 42 of the treaty of Berlin of July 13, 1878.)

“(ε) The mouths of the Congo and Niger and the coastal waters adjacent thereto. (General agreement of the Berlin conference of February 26, 1888, arts. 25 and 33.) The right of capture may also be no further exercised when a merchant vessel during the course of pursuit or while under visit and search reaches the waters referred to in (a) and (b).” (1925, Naval War College, International Law Documents, p. 3.)

The German Prize Code of 1916 (art. 3) states that “a war vessel may, of course, pass through neutral terri-

torial waters in order to hold up a ship outside these limits."

Norwegian coast.—While this Situation III refers to no specific coast and while the same type of coast formation so far as jurisdictional problems may arise in areas of shallow waters or where coral reefs prevail, the Norwegian coast has many striking characteristics. These were mentioned in a report presented by a Royal committee in 1924. The committee said :

The coastal waters of Norway with their outlying banks are characteristic and quite different from those of other European countries. They also vary greatly in different parts of the country. This remarkable character of the coast is due to the fact that Norway is a mountainous country—an irregular mass of rock—furrowed and cleft by an infinite number of gullies and valleys. The coast line winds in and out of bays and fjords, which in many places cut very deeply into the mainland. Thus the coast is highly variable and this variability is intensified by the numerous large and small islands, islets, holms and rocks that lie strewn at various distances from the mainland proper. Only two comparatively short stretches of coast are without their skerry guard, viz, Jaederen in the southwest, and east Magerøen on the northern coast. Along these stretches of coast that possess a skerry guard, i. e. the predominant part of the coast, tall pointed mountain tops rise from the bottom of the sea nearly up to the surface of the water. These hidden rocks or shallows, with dividing furrows and channels, cause still greater variability in the formation of the sea floor. As a rule the latter descends from the shore in terraces with steep, mountainous precipices. The formation common to other countries, viz. banks sloping evenly from the shore to an outer ridge of banks, is very rare in Norway, and is limited more or less to the stretches where there is no skerry guard. (The Principal Facts concerning Norwegian Territorial Waters, p. 5.)

The early claims as to exclusive rights in fisheries off the shore seem to have been acquiesced in by other maritime states and other states made similar claims. When these claims overlapped, conflicts arose and were often adjusted by treaties. The Scandinavian states maintained the 4-mile limit as a rule and before the World War regarded this as the neutral belt in time of war.

The report of the committee also says after referring to treaties of the fifteenth century :

During the two centuries then ensuing, the Kings of Norway felt induced to depart gradually from their old policy of claiming dominion over these Northern waters, and confined themselves by degrees to asserting sovereignty over certain stretches of water on the coasts. Finally, the range of vision was in certain respects considered and maintained as the limit of Norwegian territorial waters, also as regards the Northern seas. According to a Royal Decree of 20th June, 1691, the entire sea between Norway and Jutland, outside the range of vision from land, was to be considered as neutral waters. Further, by a treaty of December, 1691, between Norway and Denmark, on the one part, and Great Britain and the Netherlands on the other part, it was expressly stipulated that enemies of the two latter countries were not to be allowed to capture vessels belonging to the subjects of these countries within sight of any land belonging to the Danish Norwegian King. The Admiralty likewise applied this boundary limit in connection with the maintenance of neutrality. The range of vision was reckoned as 4 or 5 geographical miles from the outermost islets. (Ibid., p. 47.)

The "*Bangor*," 1915.—On March 14, 1915, the *Bangor*, a steamship flying the Norwegian flag and apparently under control of a German agent, was met at the mouth of the Strait of Magellan by a British vessel of war and put in charge of a prize crew. The *Bangor* was then taken to the Falkland Islands. Before the prize court the owners admitted liability to condemnation "unless she was immune from capture on the technical ground that she was at the time in waters alleged to be territorial waters of a neutral State."

The vessel was captured in the Strait of Magellan. According to the entry in the log she was captured when she was in the middle of the Strait of Magellan, about opposite Port Tamar anchorage. This agreed with the statement of the British naval officers. The Strait of Magellan is admitted to be 7 miles wide at that place. Strictly, therefore, the middle would not be within 3 miles of the land on either side.

The ship's master gave evidence that he took bearings which fixed his position much nearer the south shore than the line midway between the land on the north and south sides. His

evidence is not worthy of any credence, and I cannot accept any part of it as being true. Accordingly, if it is material to establish that the capture took place within 3 miles, or a marine league, of either shore, the claimants have not proved to my satisfaction that it did.

The limits of territorial waters, in relation to national and international rights and privileges, have of recent years been subject to much discussion. It may well be that the old marine league, which for long determined the boundaries of territorial waters, ought to be extended by reason of the enlarged range of guns used for shore protection. This case does not, in my view, call for any pronouncement upon that question. I am content to decide the question of law raised by the claimants upon the assumption that the capture took place within the territorial waters of the Republic of Chile.

This assumption, of course, does not imply any expression of opinion as to the character of the Strait of Magellan as between Chile and other nations.

This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

In 1879, the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait.

Later, in 1881, the Republic of Chile entered into a treaty with the Argentine Republic by which the Strait of Magellan was declared to be neutralized for ever, and free navigation was guaranteed to the flags of all nations.

I have referred to these matters in order to show that there is a right of free passage through the Strait of Magellan for commercial purposes. It is not inconsistent with this that during war between any nations entitled to use it for commerce the Strait of Magellan should be regarded in whole or in part as the territorial waters of Chile, whose lands bound it on both sides. ([1916] P. p. 181; 5 Lloyd's Prize Cases, pp. 308, 313.)

While the court assumed for the purpose of this case that the *Bangor* was within territorial waters, it was stated this was a matter between the neutral and belligerent state and did not affect the rule relating to capture as between the belligerents, and the vessel and cargo were condemned.

The "Dresden," 1915.—One of the cases which arose in the first year of the World War gave rise to much discussion. This was the case of the *Dresden*, a German cruiser anchored, within 500 meters from the shore, in Cumberland Bay, in the island of Mas-a-Tierra, belonging to the Republic of Chile. The British fleet attacked the *Dresden*. The British Government stated they were "prepared to offer a full and ample apology," and then intimated that they were aiding in maintaining Chilean neutrality, etc., though affirming that they did "not wish to qualify the apology." The correspondence at the time, which was important, was as follows:

THE CHILEAN MINISTER TO SIR EDWARD GREY

(Received March 26)

(Translation.)

Sir,

In compliance with instructions from my Government, I have the honour to inform your Excellency of the facts which led to the sinking of the German cruiser *Dresden* in Chilean territorial waters, as they appear to be established by the information in the possession of the Chilean Government.

The cruiser cast anchor on the 9th March in Cumberland Bay, in the island of Mas-a-Tierra, belonging to the Juan Fernandez group, 500 metres from the shore, and her commander asked the Maritime Governor of the port for permission to remain there for eight days for the purpose of repairing her engines, which were, he said, out of order. The Maritime Governor refused to grant the request, as he considered it unfounded, and ordered the captain to leave the bay within 24 hours, threatening to intern the cruiser if her stay were prolonged beyond that period. Upon the expiry of the time stated the Maritime Governor proceeded to notify the captain of the *Dresden* that he had incurred the penalty imposed, and he immediately reported the situation which had arisen to the Governor of the Republic. Meanwhile on the 14th March, a British naval squadron, composed of the cruisers *Kent* and *Glasgow* and the armed transport *Orama*, arrived at Cumberland Bay and immediately opened fire upon the *Dresden* while she lay at anchor. The Maritime Governor who was making his way towards the *Glasgow* in order to carry out the usual obligations of courtesy, was compelled to return to land.

The *Dresden* hoisted a flag of truce, and despatched one of her officers to inform the *Glasgow* that she was in neutral waters, a circumstance disregarded by the British naval squadron, which summoned the *Dresden* to surrender, warning her that if she refused she would be destroyed. The captain of the *Dresden* then gave orders to blow up the powder magazine and sink the ship.

The act of hostility committed in Chilean territorial waters by the British naval squadron has painfully surprised my Government.

The internment of the *Dresden* had been notified to her captain by the Maritime Governor of Juan Fernandez, and the Government of the Republic, having been informed of what had occurred, would have proceeded to the subsequent steps had it not been for the intervention of the British naval squadron. Having regard to the geographical position of the islands of Juan Fernandez and to the difficulty of communication with the mainland, the only authority able to act in the matter did everything possible from the outset, and the internment of the *Dresden* was as effective and complete as the circumstances would permit when she was attacked by the British naval squadron. Even supposing that the British force feared that the *Dresden* intended to escape and to ignore the measures taken by the Maritime Governor of Juan Fernandez, and that this apprehension was adduced as the reason which determined its action, it should still be observed that the close watch which the British naval squadron could itself exercise precluded the possibility of the attempt. Moreover, no such eventuality was contemplated by the British squadron which, as I have said, did not give the Maritime Governor of Mas-a-Tierra the opportunity of explaining to the naval officer in command of the island the state of the *Dresden* in Cumberland Bay. The officer in command of the squadron acted *à priori* without pausing to consider that his action constituted a serious offence against the sovereignty of the country in whose territorial waters he was at the time. The traditions of the British navy are such that I feel convinced that if the officer who commanded the British squadron had received the Maritime Governor, who was going on board his ship in the fulfilment of his duty, and had been informed of the state of the interned vessel, he would not have opened fire upon her and would not have brought about the situation which now constrains my Government, in defence of their sovereign rights, to formulate the most energetic protest to His Britannic Majesty's Government.

Your Excellency will not be surprised that the attitude of the naval squadron should have aroused such deep feeling in Chile if you bear in mind the fact that the British warships composing

it had received, shortly before and upon repeated occasions, convincing proofs of the cordial friendship which unites us to Great Britain, and which finds its clearest and strongest expression in our respective navies. They had been supplied in the ports of the republic with everything which it was permissible for us to furnish consistent with our neutrality in the present European conflict. Nothing, therefore, could be a more painful surprise to us than to see our exceedingly cordial and friendly attitude repaid by an act which bears unfortunately all the evidences of contempt for our sovereign rights, although it is probable that nothing was further from the minds of those by whom it was unthinkingly committed.

Nor will your Excellency be astonished that my Government should show themselves to be very jealous of the rights and prerogatives inherent in the exercise of sovereignty. Nations which lack powerful material means of making their rights respected have no other guarantee and protection for their life and prosperity than the clear and perfect understanding and the exact and scrupulous fulfillment of the obligations incumbent upon them towards other nations, and the right to demand that other nations shall equally observe their duties towards them. Few nations have given more convincing proofs than Great Britain of their desire to comply with international obligations and to require compliance from others, and few have shown more eloquently their respect for the rights and prerogatives both of great and small nations. These facts convince my Government that His Britannic Majesty's Government will give them satisfaction for the act committed by the British naval forces of a character to correspond with the frankly cordial relations existing between them. Nothing could be more deeply deplored by the Chilean Government than that the traditional bonds of friendship uniting the two peoples, which my Government value so highly and upon which they base so many hopes of new and mutual benefits, should fail to derive on this occasion additional strength from the test to which circumstances have subjected them.

I have, &c.

AGUSTINE EDWARDS.

No. 2. SIR EDWARD GREY TO THE CHILEAN MINISTER

FOREIGN OFFICE, *March 30, 1915.*

Sir,

HIS Majesty's Government, after receiving the communication from the Chilean Government of the 26th March, deeply regret that any misunderstanding should have arisen which should be a cause of complaint to the Chilean Government; and, on the facts

as stated in the communication made to them, they are prepared to offer a full and ample apology to the Chilean Government.

His Majesty's Government, before receiving the communication from the Chilean Government, could only conjecture the actual facts at the time when the *Dresden* was discovered by the British squadron; and even now they are not in possession of a full account of his action by the captain of the *Glasgow*. Such information as they have points to the fact that the *Dresden* had not accepted internment, and still had her colours flying and her guns trained. If this was so, and if there were no means available on the spot and at the moment for enforcing the decision of the Chilean authorities to intern the *Dresden* she might obviously, had not the British ships taken action, have escaped again to attack British commerce. It is believed that the island where the *Dresden* had taken refuge is not connected with the mainland by cable. In these circumstances, if the *Dresden* still had her colours flying and her guns trained, the captain of the *Glasgow* probably assumed, especially in view of the past action of the *Dresden*, that she was defying the Chilean authorities and abusing Chilean neutrality, and was only awaiting a favourable opportunity to sally out and attack British commerce again.

If these really were the circumstances, His Majesty's Government cannot but feel that they explain the action taken by the captain of the British ship; but, in view of the length of time that it may take to clear up all the circumstances and of the communication that the Chilean Government have made of the view that they take from the information they have of the circumstances, His Majesty's Government do not wish to qualify the apology that they now present to the Chilean Government.

I have, &c.

E. GREY.

(British Parliamentary Papers, Misc. No. 9 [1915], [Cd. 7859].)

Inviolability of neutral waters.—Neutral waters, while generally open to innocent passage of belligerent vessels in time of war, may be closed and have been closed to vessels of war and vessels assimilated thereto.

A vessel in distress is, however, permitted to enter and is granted necessary asylum and may make such repairs as are needed to make the vessel seaworthy. If a vessel enters neutral waters to escape capture, the neutral state is usually under obligation to intern the vessel after 24 hours' sojourn.

A vessel of war might, from within neutral waters, resist an attack or a continuation of an operation, but when the vessel in neutral waters ceases operations or is no longer able to continue the resistance, no further belligerent action may be taken.

While it might be possible to permit a vessel of war of one belligerent to rescue the distressed crew of a vessel of war of another belligerent even in territorial waters of a neutral, this would be merely as an act of humanity and not as an act of war and the crew should be turned over to the neutral state or should be merely detained.

The "Thor," 1914.—In the Royal Court of St. Lucia on October 30, 1914, a decision was rendered in the case of the *Thor*, a Norwegian steamer loaded with coal originally chartered by the Inter-American Steamship Line; later receiving on board a German supercargo in the person of one Weiler, a chief petty officer of the German Naval Reserve who gave the captain of the *Thor* the following letter:

We beg to inform you that we have re-let the steamer for about three months to the Hamburg-Amerika Line, of New York, and in accordance with clause 12 they will send a supercargo with your steamer whose instructions you will please follow. We request you to do all possible for the interests of the Hamburg-Amerika Line; and their superintendent, who goes with the steamer, has instructions to allow you very liberal gratuities.

The judge in this case after considering that from August 9 to August 26 the *Thor* was "steaming up and down with two German colliers and one other neutral collier chartered by a German firm, all clearly, waiting for something to coal" said:

It therefore becomes necessary to consider whether her behaviour amounted to unneutral service, and for that purpose to ascertain what modification, if any, has been effected by the Declaration of London in the law on that point.

The English rule was this: "A neutral vessel chartered or employed by a belligerent Government to carry a cargo on its

behalf and acting under the orders or direction of that Government or of its officers is liable to condemnation as an enemy ship, together with the cargo so carried"—The *Rebecca* 1811 (2 Acton, 119). The formula submitted to the Conference was more epigrammatic, but equally effective; it provided that merchant vessels "entièrement ou spécialement au service du belligérant ennemi" should lose their neutral character. (1 Trehern, British and Colonial Prize Cases, p. 229.)

The *Thor* was condemned as lawful prize.

Liability of the "Petro."—The nationality of the *Petro*, the tanker from which the cruiser *Xerxes* of State X is refueling is not stated. If it was a naval tanker it would be liable to the same treatment as a vessel of war. If it was a tanker owned by private enemy parties, it would be serving as an auxiliary and would be liable to be sunk. If it was a neutral tanker it would be similarly liable as engaged in unneutral service. Such a neutral vessel has so far identified itself with the belligerent as to render itself liable to the same treatment as a belligerent vessel.

Submerged reefs.—While there have been arguments from time to time in favor of the determination of jurisdiction over coastal waters based on navigability or upon depth, such arguments have not been generally accepted. If the principle of navigability had been accepted, the problem of fixing the depth line for draft of ships would have had many analogies to the problem of the range of cannon shot. There would have been other problems arising from the changing and shifting depths of waters along certain coasts.

In August, 1925, certain questions arose in the case of *United States v. Henning et al.* in regard to the status of Sea Horse Reef, 16 miles off the west coast of Florida. It was contended that this was a part of the coast of the United States, but the court did not "concede this construction." (7 Fed. 2d series, p. 488.)

Neutral rights and duties.—From the varied practice and theories, it is apparent that there is not complete agreement as to jurisdiction over waters off a coast dotted

with islands, reefs, etc. By article 1 of XIII Hague Convention belligerents are bound to respect the rights of neutral powers. It can not be presumed that a vessel taking fuel in neutral jurisdiction is necessarily exceeding its rights, but by article 25 of XIII Hague Convention,

A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters. (1908, Naval War College, International Law Situation, p. 220.)

If a belligerent protests to a neutral that an enemy is violating a provision of the laws of neutrality and the neutral takes no action, the belligerent may presume that the neutral is not able to prevent the violation or that it does not regard the contention as valid. A neutral is not obliged to assume jurisdiction along its coast beyond 3 miles. The belligerent must then determine what action to take for its own protection and if under ordinary conditions no possibility of violation of neutral rights were involved the belligerent might lawfully attack its enemy.

If one belligerent attacks another, even within neutral jurisdiction, the attacked belligerent may lawfully defend itself from such attack and so far as possible render its enemy unable to continue operations.

Protective jurisdiction.—That a certain degree of protective jurisdiction may in specific case extend beyond the 3-mile jurisdiction is admitted. In 1864 in referring to the French position that the *Alabama* and *Kearsarge* should not engage in such proximity to the French coast as would put it in danger from shell fire, the United States, while heeding the request, did not admit that French jurisdiction extended beyond 3 miles. (1904, Naval War College, International Law Situations, pp. 132-134.) In the same year the question was again raised when the U. S. S. *Rhode Island* fired upon the

Margaret and Jessie off Eluthera and the British Government expressed the opinion:

that vessels should not fire toward a neutral shore at a less distance than that which would insure shot not falling into neutral waters, or in a neutral territory. (Ibid., p. 135.)

Belligerent control of neutral vessels.—A belligerent is entitled to humane treatment in time of distress. This was provided for in the 1907 Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention. For example, article 9 is to the following effect:

Belligerents may appeal to the charity of the commanders of neutral merchant ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed. (1908, Naval War College, International Law Situations, p. 205.)

This article 9 refers to neutral vessels which of their own accord take on board sick, wounded, or shipwrecked men and to neutral vessels which on request take on board sick and wounded.

The reference to "sick and wounded" in the first paragraph and to "sick, wounded, or shipwrecked" in the second paragraph of article 9 was not by inadvertence but was considered at The Hague Conference in 1907. M. Louis Renault, the reporter for the subcommission which had this convention in charge, in the discussion, says:

In 1899 it was asked what should be the fate of the sick, wounded, and shipwrecked. They may, as a matter of fact, be in very different situations: on hospital ships of the State, on hospital ships of national or neutral relief societies, or on merchant vessels of hostile or neutral nationality. There has been much discussion on this point, and very different solutions have

been introduced into the additional articles of 1868. After mature reflection, we agreed to base our action on a very simple principle: A belligerent who duly has in his possession combatants of the adversary has a right to make them prisoners of war; if the combatants are sick or wounded, it is his duty to care for them. It is only necessary to apply this principle to the various cases which may arise: A cruiser meets a hospital ship (batiment hôpital) or a "hospitable" ship (bâtiment hospitalier), and has a right to search it and supervise what takes place thereon. It finds sick, wounded, and shipwrecked persons, and has an absolute right to consider them as prisoners. In most cases, as far as the sick and wounded are concerned, it is entirely to the advantage of the cruiser to leave them where they are, for it would have to transport and care for them. But it may also happen that it will be in its interest to treat some of them as prisoners; this is more particularly the case with the shipwrecked persons. It matters little on board of what vessel these sick, wounded, or shipwrecked persons are found, provided they are duly in the possession of the enemy. This is the case whenever a belligerent cruiser meets on the high seas any vessel other than a neutral war vessel. (3 Proceedings of the Hague Peace Conferences, Carnegie Endowment for International Peace, p. 568.)

Salvaging.—Salvaging of public ships by private agencies may be on the same basis as the salvaging of private ships. The difficulties that have most often arisen have been in connection with the payment for such services when it has been impossible for the salvor to bring action against the public ships. As was said in the British court in the case of the *Porto Alexandre* ([1920] P., p. 30.):

These are matters to be dealt with by negotiations between governments, and not by governments exercising their power to interfere with the property of other States contrary to the principles of international courtesy which govern the relations between independent and sovereign States.

That salvaging operations of a neutral on the high sea in behalf of one belligerent should not interfere with the exercise of the rights of the other belligerent as against his enemy is admitted without argument. Indeed the neutral salvaging vessel must to escape risk avoid any

participation in the hostilities and may act only for the preservation of the vessel of war against the forces of nature. The salvaging must be clearly distinguished from obligations which might arise under the Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention.

Discussion, 1930.—Certain matters in regard to the general nature of salvage arose in the consideration of Situation II and the discussion may be found in Naval War College, International Law Situations, 1930, pages 84–90.

Obligation to rescue.—While the obligation of a neutral private vessel to rescue shipwrecked personnel of a vessel of war may be recognized, there is no obligation to take the personnel from a vessel of war in anticipation that it may be sunk by an enemy.

Vessels of war are subject to the risks of war.

Neutral private vessels are under no obligations to participate to the advantage of either belligerent.

The fact that a vessel of war of one belligerent can not accommodate on board the personnel of an enemy vessel of war does not place a neutral under special obligation to either party.

By article 16 of the 1907 Hague Convention for the Adaptation to Naval War of the Principles of the Geneva Convention, it is prescribed that:

After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill treatment. (1908, Naval War College, International Law Situations, p. 207.)

SOLUTION

(a) As neutral State R takes no action, the action of submarine *Y 50* is lawful. The defense of cruiser *Xerxes* is lawful, but the taking of the crew of the beached *Y 50* as prisoners of war is not lawful.

State X has no ground for valid protest.

State Y may protest against the taking of the crew of *Y 50* as prisoners of war.

State R may protest against the action of the *Xerxes* in entering its waters and making the crew of *Y 50* prisoners of war.

(b) The place of salvaging is in the high sea and the salvaging operations are lawful. The salvaging vessel is under obligation to cease operations but under no obligation to take the crew of the *Xenophon* on board. The relative weakness of the submarine *Y 51* gives it no right to demand exceptional services from the salvaging vessel. The *Xenophon's* armament and boats being intact, the conditions for which the Hague-Geneva Convention provides have not arisen, and the salvaging vessel may decline to take any action except to discontinue salvaging operations unless upon agreement of all parties.